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No. 81-5321

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1981

EARL ENMUND,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

JIM SMITH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Attorney of Record

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General

The Capitol Building
Tallahassee, Florida 32301
(904) 488-0600

QUESTIONS PRESENTED

1. WHETHER THE DEATH PENALTY CAN EVER BE CONSTITUTIONALLY APPROPRIATE FOR A DEFENDANT CONVICTED OF FIRST DEGREE MURDER STEMMING FROM HIS EXTENSIVE PARTICIPATION IN A DEADLY FELONY INVOLVING FIREARMS, WHEN THE DEFENDANT, ALTHOUGH PRESENT IN THE VICINITY OF THE KILLINGS, DID NOT PERSONALLY COMMIT THE MURDERS, AND THERE WAS AN ABSENCE OF PROOF THAT HE INTENDED THE DEATHS TO OCCUR?

2. WHETHER PETITIONER'S DEATH SENTENCES WERE APPROPRIATE CONSIDERING HIS HIGH DEGREE OF INVOLVEMENT IN THE CRIMES, THE FORSEEABILITY THAT DEATHS WOULD OCCUR DURING A ROBBERY INVOLVING THE USE OF FIREARMS, AND THE FACT THAT PETITIONER NEITHER INTRODUCED NOR PROFFERED ANY EVIDENCE IN MITIGATION?

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STATEMENT OF THE CASE

Petitioner's statement of the case omits material facts, is not written in a light most favorable to sustain the rulings of the Florida courts, and is unacceptable.

Petitioner was convicted of two counts of first degree murder and one count of robbery in the Circuit Court of Hardee County, Florida (R 1647). After a sentencing hearing in which Petitioner neither introduced nor proffered any evience (R 1677), the jury recommended that sentences of death be imposed for the two first degree murder convictions (R 1691). Petitioner's co-defendant, Sampson Armstrong, was also convicted of two accounts of first degree murder, and the jury recommended two death sentences for him also. The trial court then found

that the aggravating circumstances outweighed the mitigating circumstances and sentenced Petitioner to death on both first degree murder counts (R 1700, 1701). He received a life sentence for the robbery conviction.

The murders and robbery arose out of an incident which occurred on April 1, 1975. Sometime in March, 1975, Petitioner and two other individuals had been present at the victims' home in order to buy a calf (R 997). One of the victims, Thomas Kersey, exhibited a large roll of cash, and Petitioner later admitted that the amount of cash had been a topic of discussion that evening (R 1509).

Early on the morning of the murders, Petitioner was seen in a car near the scene of the murders (R 1330-1303). An accquaintance of co-defendant Armstrong

testified that on the day of the murders Armstrong had told him that he, Petitioner, and Armstrong's wife had robbed and killed an elderly couple (R 1345-1353). Armstrong and his wife had approached the old couple's farm house door ostensibly for the purpose of asking for water for an overheated car. However, Armstrong grabbed victim Thomas Kersey at which time Mrs. Kersey opened fire and shot Jeannette Armstrong. A gun battle ensued, and both Mr. Kersey and his wife were murdered. Shortly thereafter, Petitioner was seen driving the same automobile which had been seen outside the victims' residence by another witness. In the car with him were his common law wife and two unidentified persons, one of whom was lying down in the back seat of the car (R 1303).

Petitioner's common law wife, Ida Jean Shaw, testified that on April 2, 1975, she had been in an automobile with both Armstrong and Enmund and that Armstrong had given her two hundred dollars (R 1195). She also testified that on the day of the murders she asked Enmund why he had done it, and he replied that he had seen the man with the money when he had bought the calf (R 1205, 1206). During the same conversation, Armstrong stated that he had made sure that the people were dead (R 1207, 1208).

Based on these facts, the Supreme Court of Florida upheld the trial court's findings that victim Kersey had a reputation for carrying large sums of money on his person, that Petitioner had actually seen Mr. Kersey with the money, and that Enmund planned and participated in the

robbery which resulted in the murders. Also upheld was the trial court's finding that Enmund had helped to cover up the crime by directing that Ida Jean Shaw dispose of the murder weapons (R 1201).

The Florida Supreme Court's more detailed statement of facts can be found at Enmund v. State, 399 So.2d 1362, 1363-1367 (Fla. 1981)(J.A. 35-42).

SUMMARY OF ARGUMENT

I.

The Constitution does not require proof of intent before a defendant can be found criminally responsible. Rather, the determination of criminal responsibility has traditionally been left to the various states, whose legislative determinations are afforded great deference and will not be disturbed absent a showing of irrationality.

When determining whether a legislative judgment that a sentence is appropriate for a particular crime is rational, this Court has traditionally refrained from drawing "bright lines." Judicially created, inflexible rules are especially inappropriate in criminal cases because, as this Court has traditionally held, a particular sentence

must be tailored to meet the peculiar facts and circumstances of the crime as well as the character of the individual perpetrator.

The Florida Legislature did not act arbitrarily or irrationally when it based criminal responsibility upon concepts of foreseeability. The Florida Legislature rationally concluded that homicides were more likely to occur during the commission of certain potentially dangerous felonies, and it provided that its most serious sanction should be imposed in the most extreme cases. However, in Florida, just because a death sentence is possible, it is not automatic. The sentencing authority's discretion is guided and channeled, Proffitt v. Florida, 428 U.S. 424 (1976), and the sentencing authority is required to weigh all relevant

mitigating evidence against the applicability of specified aggravating factors. In that regard, Florida has a statutory mitigating circumstance which requires that the sentencing authority consider the extent of an accomplice's participation in the capital felony.

The Florida Legislature also rationally concluded that the threat of capital punishment would deter potential murder-felons from committing the underlying felonies which often result in death. Gregg v. Georgia, 428 U.S. 153 (1976). Moreover, Florida's legislative determination that it should be possible to impose the ultimate penalty upon a defendant who was convicted of recklessly engaging in foreseeably deadly conduct is also rational. Any judicial conclusion to the contrary would threaten the lives

of numerous innocent victims who might otherwise be murdered if their assailants or robbers knew they had nothing to lose by eliminating witnesses to the underlying felony. A bright line is simply not appropriate.

II.

Death is the appropriate sentence for Petitioner because of his extensive involvement in the underlying felony which resulted in the murders of two innocent, elderly people. While the fact that it was not proved that Petitioner intended the murders to occur might be relevant in mitigation, this doesn't mean that either the trial court or the jury had to find that Petitioner was a minor accomplice. In fact, the sentencing authority found to the contrary that Petitioner's participation was major --

he planned the robbery, procured his accomplices, participated in the robbery, was present in the getaway car near the actual murders, and helped to cover up the crime.

Finally, although Lockett v. Ohio, 438 U.S. 586 (1878), requires a sentencing authority to consider all relevant mitigating evidence which was proffered or introduced, Petitioner presented absolutely no mitigating evidence during the sentencing phase of his trial. Therefore, because Petitioner has not even challenged the applicability of the two valid aggravating circumstances found by the Supreme Court of Florida, the aggravating circumstances indisputably outweigh the total absence of evidence in mitigation. Petitioner's death sentences should not be disturbed.

ARGUMENT

I.

THE EIGHTH AMENDMENT DOES NOT REQUIRE PROOF OF MENS REA AND/OR INTENT BEFORE A DEFENDANT CAN BE FOUND CRIMINALLY RESPONSIBLE.

The Petitioner's major theme is that his death sentences are disproportionate to his criminal conduct because there was no proof that he intended deaths to occur. Therefore, while paradoxically conceding that the State of Florida can hold him criminally responsible and thus guilty of first degree murder,[1] Petitioner maintains that a death sentence cannot be imposed in his case. However, Petitioner's argument must fail because the Eighth Amendment does not require

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[1]Section 777.011, Fla. Stat., allows an aider and abettor to be convicted and punished as a principal. (J.A. 47).

proof of either mens rea or actual intent before a state can find an offender criminally responsible and eligible for the punishment prescribed by law.

In Powell v. Texas, 392 U.S. 514, 535 (1968), the Court announced that it had never stated that the Constitution required a finding of mens rea before criminal responsibility could be found:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds. [footnote omitted] The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.

Id. at 392 U.S. 535, 536 (Emphasis added).

In a footnote in his concurring opinion in Powell, Justice White honed in on the crucial analysis which must be examined when determining criminal responsibility -- "The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" Id. at 392 U.S. 551, n.2. Stated in terms of the issues presented in Petitioner's case, Justice White's comments would be whether the defendant's volitional acts brought about the murders and whether the defendant's acts were sufficiently proximate to allow Florida to impose penal sanctions.

More recently, while concurring in Lockett v. Ohio, 438 U.S. 586, 614 (1978), Justice Blackmun recognized that a requirement of proof of an actual intent to kill before a defendant could be capitally sentenced would impose on the States an artificially defined mens rea. In language[2] consistent with Powell v. Texas, supra, he perceived the myriad of difficulties which would be presented by focusing on "intent," as if that were the only acceptable measure

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[2]This correct analysis is uniquely inconsistent with any notion of "bright lines" in the determination of the issue of life or death. The relevant considerations cannot be reduced to such a simplistic analysis. Justice Blackmun concurred in the judgment of the Court because under the Ohio statute, unlike Florida's, the sentencer was unable to consider "the degree of the defendant's [non-triggerman] participation in the acts leading to the homicide and the character of the defendant's mens rea." Id. at 438 U.S. 616.

of criminal responsibility. Also, he recognized that proof of mens rea would not be a functional method for determining culpability for eighth amendment purposes, because culpability involved a mixture of action, inaction, and degrees of mens rea:

> 2. I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally?

What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L Ed 2d, at 1004, transforms the culpability of those defendants' actions?

Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even

though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

The requirement of the actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for

> Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.
>
> Finally, I must question the data relied upon by my Brother White in concluding, post, at 624, 57 L Ed 2d, at 1002, that only "extremely rare[ly]" had the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accepted uncritically, was merely that, of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"-not that the defendant had actual intention to kill. App to Brief for Petitioner 1b. Of contemporary death penalty statutes, my Brother White concedes that approximately half permit the execution of persons who did not actually intend to cause death. (Emphasis added).

Lockett, supra at 438 U.S. 614, 615. Justice Blackmun's observations illustrate the ramifications and irrational results of Petitioner's bright line

theory predicated solely on intent -- and his comments effectively show why a focus on actual intent is patently unacceptable as the sole measurement of criminal responsibility.

Justice Rehnquist, dissenting in part, said it more directly:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter

> were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L.Ed.2d, at 1002. Centuries of common law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 438 U.S. 635, 636.

Justice Rehnquist's reference to Justice White's separate opinion in Lockett concerned the question of whether

a mens rea or actual intent to kill was necessary before a death sentence could be imposed. Justice White's position in Lockett is particularly troublesome to Respondent because of his position in Woodson v. North Carolina, 428 U.S. 280 (1976). In that case, defendant Woodson, like Petitioner, was capitally convicted on a felony murder theory even though he was not personally present in the store where the murder occurred, did not pull the trigger, acted only as a lookout outside the door, and there was an absence of proof that he intended anyone to die. In a dissenting opinion, Justice White stated that he would uphold Woodson's first degree murder conviction and resulting mandatory death sentence, thus implicitly approving a death sentence when intent to kill had not been proven.

Notwithstanding the fact that there is no persuasive or binding legal authority to support Petitioner's argument, the best evidence that the Constitution does not require proof of actual intent to kill before a death sentence can be imposed is the Constitution itself. Article III, Section 3 provides that the Congress shall have the power to decide the punishment for the crime of treason. Congress has provided that a maximum penalty of death can be imposed against one convicted of treason. See 18 U.S.C. §2381.[3] Any judicial

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[3]The Fifth Circuit Court of Appeals has declared the death penalty provision of the Federal Government's murder statute, 18 U.S.C. § 1111, unconstitutional on procedural grounds. United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977). However, legislation is currently pending before Congress to reinstitute the death penalty under federal law. See discussion of S.114, infra.

conclusion that capital punishment is cruel and unusual if it were imposed upon a defendant who was not proven to have intended to kill would purportedly deny the Congress its right and power to determine the punishment for the crime of treason. This power is expressly given to Congress by the Constitution. It should also be noted that treason is a crime which not only does not require intent to kill but also does not require death at all. See 18 U.S.C. § 2381.

Legislation presently pending before Congress "would authorize the imposition of the death penalty for a number of federal felonies in which death results, even if there is no finding that the defendant either committed the crime with the conscious purpose of causing death or participated in the homicidal act."

Capital Punishment: Hearings on S.114 Before the Committee on the Judiciary, 97th Cong., 1st Sess. 25 (1981) (letter stating the views of the Justice Department).

Senate Bill 114 would allow the death penalty in some instances even where death did not occur. For example, Congress is contemplating authorizing death for the attempted assassination of the President. Id. at 59-65 (Memorandum of Justice Department). See also S. Rep. No. 143, 97th Cong., 1st Sess. 5,6,12,13 (1981). Also included in S.114 are the non-homicidal crimes of espionage, 18 U.S.C. §794, and treason, 18 U.S.C. §2381.[4]

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[4]In a footnote, the Justice Department listed the following crimes for which the death penalty could be imposed even if

Consequently, if this Court were to adopt the position urged by Petitioner, in effect, the Court would be declaring S.114 unconstitutional before it was even enacted into law. Considering the far-reaching effect an adverse ruling by this Court would have on the aggregate criminal justice system, and the scope of Congressional consideration in an identical area of endeavor, this Court might wish to consider inviting the Justice Department to air its views of

(continued from previous page) death were an unintentional result: 18 U.S.C. §32 (destruction of aircraft or aircraft facilities); 18 U.S.C. §33 (destruction of motor vehicles or motor vehicle facilities; 18 U.S.C. §351(b) (kidnapping a Member or Member-elect of Congress); 18 U.S.C. §§844(d),(f), and (i) (explosives offenses); 18 U.S.C. §1201 (kidnapping); 18 U.S.C. §1716 (mailing injurious articles); 18 U.S.C. §1751(b) (kidnapping of the President, Vice President, President-elect, or Vice President-elect;

the subject at issue. Much could be learned from the key principals in a critical area of activity.

Petitioner has presented absolutely no authority to support his contention that proof of intent to kill is prerequisite to a capital sentence in a felony murder situation. Moreover, the Court has already upheld a death sentence for a defendant convicted as an accomplice in a felony murder situation where there was no proof of the defendant's intent to cause death. See Stein v. New York, 346 U.S. 156 (1953).

(continued from previous page)18 U.S.C. §1992 (wrecking trains); 18 U.S.C. §2113(e)(bank robbery); 49 U.S.C. 1472(i) or (n) (aircraft piracy). Also death resulting from the attempt or commission of the following crimes would be punishable by death: any rape, arson, burglary or robbery in the special maritime or territorial jurisdiction of the United States (under 18 U.S.C. §1111).

If Petitioner's argument were accepted, there would be no need for the felony murder rule itself, a traditional concept and rule of law which he has not seen fit to challenge (Brief of Petitioner at 19). See also Lockett v.Ohio, supra, at 438 U.S. 602. Thus, since the Constitution does not require an intent to kill before capital punishment can be imposed, the next question which must be examined is Petitioner's contention that this Court should judicially create a rule prohibiting capital punishment in such cases.

A. The Court should refuse to draw a bright line which would usurp the traditional authority of the various state legislatures to determine what punishment is appropriate for a particular crime.

Despite the fact that the Constitution does not require it, Petitioner

has attempted to convince the Court to draw a bright line and rule that the Eighth and Fourteenth Amendments prohibit the States from ever imposing a death sentence upon a defendant convicted of felony murder when the defendant was not the person who committed the murder and where there was an absence of proof that the defendant intended anyone to die. Petitioner asks this Court to go too far!

In fact, the Court has traditionally and consistently rejected the temptation to draw bright lines on constitutional issues. For example, see Rummel v. Estelle, 445 U.S. 263, 285 (1980)(type and severity of punishment of recidivists is a matter within the sound discretion

of the sentencing jurisdiction).[5] In capical cases, the Court has repeatedly applied a policy of approving sentencing procedures which require "particularized consideration of relevant aspects of the the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson, supra, at 428 U.S. 303 (1976). See also Lockett, supra at 438 U.S. 602 (1978). Most recently, this concept was reiterated in Eddings v. Oklahoma, ____ U.S. ____, Case No. 80-5727, opinion filed Jan. 19, 1982.

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[5]In a case decided just this term, the Court, in a per curiam opinion, upheld against eighth amendment challenges a state inmate's 40 year sentence for two marijuana offenses. The Court emphasized and reiterated that successful challenges to a particular sentence should be exceedingly rare and that the basic line-drawing process was a legislative rather than judicial function. Hutto v. Davis, ___ U.S. ___, Case No. 81-23, opinion filed Jan. 11, 1982.

The Court should categorically reject any suggestion that a bright line should be drawn now that it suits the argument of those opposed to capital punishment.[6] Indeed, Respondent is somewhat amazed that Petitioner is even attempting to convince this Court to adopt such an inflexible bright line rule -- this is the precise approach that some of the same counsel so strongly and persuasively urged should be rejected in the mandatory death penalty cases, Woodson, supra, and Roberts v. Louisiana, 428 U.S. 325 (1976). Petitioner's "bright line" theory is simple, all right, but that is the very argument

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[6] In fact, four Justices have clearly stated that the Constitution does not prohibit the imposition of a death sentence upon a person under the age of 18 at the time of the crime -- in other words, a bright line is inappropriate. Eddings v. Oklahoma, supra (Burger, C.J., dissenting).

against it. In some matters of government, complexity -- not simplicity -- is desirable. If simplicity were a paramount constitutional value, we would all think better of vigilante lynch law or mandatory death penalty laws. They have the virtue of simplicity, if no other.

Moreover, notwithstanding counsels' inconsistent positions, the drawing of such a simple, though rigid, bright line would forever prevent the rule from being corrected judicially, should the Court subsequently decide such a change were prudent in light of contemporary standards and conditions.

In 1976, during oral argument in Proffitt v. Florida, 428 U.S. 424 (1976), the then Attorney General of Florida advised this Court that the Florida

Legislature rejected the mandatory death penalty approach after Furman because it was socially unacceptable to the people of the State of Florida -- simply for the reason that it was too inflexible and failed to take into consideration the facts and circumstances of the offense and perpetrator. While, Furman created doubt as to what was required and many persons believed that only mandatory statutes would pass constitutional muster, the Florida Legislature made a deliberate decision to enact a good statute, even though risking it might later be determined unconstitutional, rather than a bad statute that at that time most felt would be declared valid.

It was that rational approach which ultimately resulted in the validation of Florida's death penalty statute. The

same legislature decided against limiting its applicability to individuals solely because they were not present during the commission of the crime or did not consciously intend death or because they were of a particular chronological age. Rather, in keeping with Lockett, supra, (before it was decided) those were factors for the sentencer to consider together with the facts and circumstances of the crime and the character of the defendant to determine the appropriate punishment. Eddings v. Oklahoma, supra, They were not irrational in rejecting a "bright line" concept where it would be wholly inappropriate and where it would lead to bizarre results not in keeping with notions of simple fairness and justice.

In any event, when concluding that the death penalty statutes of Georgia, Florida, and Texas did not constitute cruel and unusual punishment, the Court noted that great deference must be given to a legislative determination that a particular sentence was appropriate for a particular crime. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt, supra; Jurek v. Texas, 428 U.S. 262 (1976). Moreover, the Court also recognized that it cannot require a legislature to select the least severe penalty possible and that "a heavy burden rests on those who would attack the judgment of the representatives of the people." Gregg, supra, at 428 U.S. 175.

This deference to the legislative will of the people of the various states and the Court's exercise of judicial

self-restraint was not a new approach -- as long ago as 1910 the Court recognized that a legislature's assignment of a particular punishment to a particular crime carried with it a presumption of validity:

> However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. Weems v. United States, 217 U.S. 349, 379 (1910). (Emphasis supplied)

More recently, in Powell v. Texas, supra, at 392 U.S. 535, 536, the Court noted the importance of the traditional concepts which the common law has utilized to assess an individual's moral accountability for his antisocial deeds. The Court recognized the "constantly

shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philisophical, and medical views of the nature of man" and concluded that "[t]his process of adjustment was always thought to be the province of the States." Id.

Petitioner has made numerous references and analogies to the Court's opinion in Coker v. Georgia, 433 U.S. 584 (1977), most of the time blithely asserting that the only difference between his case and Coker's is that in the rape case "death fortuitously did not result." However, Petitioner's reliance on Coker is misplaced because of the crucial distinction in his case, i.e., in Petitioner's case two deaths did result. Therefore, Petitioner's case is more like

the 1976 death penalty cases which upheld the constitutionality of capital purishment, Gregg, supra, Proffitt, supra, Jurek, supra. The Court's analyses and rationale in those cases should be much more persuasive and effective in analyzing the question now before the Court.[7]

Therefore, because this Court has previously stated that there is no constitutional requirement for a finding of mens rea before a defendant can be found criminally responsible, Powell, supra, and because the Court has

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[7]Interestingly, it is significant to note that even in Coker v. Georgia, supra, Justice Powell, while concurring in the judgment, dissented from the Court's finding of per se unconstitutionality of Georgia's legislative determination that death could be an appropriate sanction for the crime of rape: "Today, in a case that does not require such an expansive pronoucement, the plurality draws a bright line between

traditionally exercised judicial self-restraint and declined from adopting a bright line approach in areas traditionally within the ambit of legislative authority, the next question which must be analyzed is whether Florida's legislative determinations as they pertain in Petitioner's case are rational.

(continued from previous page.) all murder and all rapes -- regardless of the degree of brutality of the rape or the effect on the victim. I dissent because I am not persuaded that such a bright line is appropriate." (Emphasis added). Coker v. Georgia at 433 U.S. 603. Justice Powell has thus rejected a simplistic bright line concept in capital cases. For example, even in Eddings v. Oklahoma, supra, Justice Powell declined to draw a bright line which would prohibit capital punishment for a juvenile, and instead remanded the case for further consideration in light of Lockett.

B. The Florida Legislature did not act arbitrarily or unreasonably when it predicated criminal responsibility upon concepts of foreseeability.

It is no longer disputed that the decision to make possible a capital sentence for a homicide is best left to the various state legislatures. Gregg, supra. In that regard, the Florida Legislature could rationally determine that under some facts and circumstances, capital punishment would be appropriate for a defendant convicted of first degree murder after engaging in such reckless conduct that death was a foreseeable and likely result.

Perhaps Justice Cardozo's comments on responsibility and forseeability, made when he was sitting on the Court of Appeals of New York, should be the

starting point for the Court's analysis:

> The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation, it is risk to another or to others within the range of apprehension. [Citation omitted] This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the the ordinarily prudent eye." Munsey v. Webb, 231 U.S. 150, 156 [Citation omitted] Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril. [Citations omitted] Under this head, it

> may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure to injury to B. [Citation omitted] These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. (Emphasis added.)

Palsgraf v. Long Island R. Co., 246 N.Y. 339, 162 N.E. 99, 100-101 (N.Y. 1928).

In terms of the above analysis, Respondent simply does not understand how Petitioner or anyone else can quarrel with the Florida Legislature's conclusion that certain conduct was so foreseeably dangerous that anyone who engaged in such conduct should be eligible for the maximum penalty. A number of United States senators obviously feel such to be the case -- see S.114, discussed previously. The best evidence of the rationality of such a legislative

determination is the fact that not one, but two deaths did occur in Petitioner's case as a direct result of the commission of one of the enumerated potentially deadly felonies. See § 782.04, Fla. Stat.; (J.A.-48).

Moreover, it should be beyond dispute that a homicide is more likely to occur during the commission of a crime in which loaded firearms are used. Besides the fact that sheer common sense dictates that the Florida Legislature's conclusion was rational, weight should be given to the fact that Florida is not the only state which has enacted death penalty legislation applicable to murder-felons or others convicted as accomplices to forseeably dangerous criminal conduct. Although not dispositive of the issue, the fact that at least twenty-six (26)

other states and the federal government have laws similar to Florida weighs heavily in Florida's favor.[8] See Coker v. Georgia, supra, at 433 U.S. 593; Gregg v. Georgia, supra, at 428 U.S. 179-182.

Thus, the Florida Legislature, along with numerous other state legislatures, has rationally concluded that certain

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[8]It should be emphasized that Respondent emphatically disagrees with Petitioner's analysis of other legislative provisions. The following statutes allow an aider and abettor to be convicted of a capital offense, even though intent to murder either has not been or cannot be proved: Ariz. Rev. Stat. Ann. §13-301(2), §13-303A.3., §13-1105; Ark. Stat. Ann. §41-1501(1); (Arkansas allows the affirmative defense that the defendant did not aid in commission of the homicidal act, but the extent of participation would be a question for the trier of fact; see Ark. Stat. Ann. §41-1501(2)); Cal. Penal Code §31, §189; Colo. Rev. Stat. §18-1-603; §18-3-102; (Colorado allows same type of affirmative defenses as Arkansas; see Colo. Rev. Stat. §18-3-102(2)(b));

criminal conduct is so dangerous that death is a foreseeable and likely result of participation in that conduct. This is the touchstone of the felony murder rule itself -- a concept which Petitioner has not seen fit to challenge.

1. Death Sentence Not Automatic

In Proffitt v. Florida, at 428 U.S. 251, the Court noted with approval that Florida's death penalty statute required

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(continued from previous page) Conn. Gen. Stat. §53a-8, §53a-54b(6),(7), & (8); Del. Code Ann. tit. 11, §271; §636; Ga. Code §26-801(b)(3), §26-1101(b); Idaho Code §18-204, §18-4003(d); Ill. Rev. Stat. ch. 38, §5-2, §9-1(a)(3); Ind. Code §35-41-2-4, §35-42-1-1; Ky. Rev. Stat. §502.020, §507.020(b); Miss. Code Ann. §97-1-3, §97-3-19(2)(e); Mont. Rev. Codes Ann. §45-2-302(3), §45-5-102(b); Neb. Rev. Stat. §28-206, §28-303; Nev. Rev. Stat. §195.020, §200.030; N.M. Stat. Ann. §30-1-13, §30-2-1(2); N.C. Gen. Stat

consideration as a statutory mitigating circumstance the extent of a defendant's participation as an accomplice in the capital felony. See § 921.141, Fla. Stat.:

> (d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (Emphasis added).

(continued from previous page) §14-5.2, §14-17; Okla. Stat. Ann. tit. 21, §172, §701.7B; Or. Rev. Stat. §161.155(2)(b), §163.115(1)(b), (Oregon allows same type of affirmative defenses as Arkansas; see Or. Rev. Stat. §163.115(3)); S.C. Code §16-1-40; §16-3-10; S.D. Compiled Laws Ann. §22-3-3, §22-16-4, §22-16-8; Tenn. Code Ann. §§39-109, §39-2407, §39-2402; Texas Penal Code Ann. tit. 2, §7.02(b); tit. 5, §19.03(a); see Wilder v. State, 583 S.W.2d 349 (Tex. Cr. App. 1979); Utah Code Ann. §76-2-202, §76-5-202(1)(d); Vt. Stat. Ann. tit. 13, §4, §2301, §2403; Wash. Rev. Code §9A.08.020, §9A.32.030(1)(c); Wyo. Stat. §6-1-114, §6-4-101;

18 U.S.C. § 2, 49 U.S.C. §1472(i)(1)(B) (aircraft piracy resulting in death); 18 U.S.C. § 794 (espionage).

By requiring consideration of a defendant's involvement in the capital felony, as well as by allowing introduction of any relevant mitigating evidence, (Lockett, supra; Eddings, supra), Florida has insured that the discretion of the sentencing authority is guided and channeled in death penalty cases--in other words a death sentence is not automatic. Thus, a defendant whose participation was in fact minor, unlike Petitioner, would have the benefit of at least one statutory mitigating circumstance.[9] In practice, a death

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[9]The following states also have statutory mitigating circumstances which require consideration of an accomplice's extent of involvement in the capital felony: Ariz. Rev. Stat. Ann. §13-703(g)(3); Ark. Stat. Ann. §41-1304; Cal. Penal Code §190.3(j); Colo. Rev. Stat. §16-11-103-(5)(d); Ill. Rev. Stat.

sentence for an aider and abettor will only be imposed in extreme cases where the defendant's involvement was major--i.e., as in Petitioner's case where he initiated, planned, procured, assisted, and covered up. Because other situations perhaps involving even more reprehensible conduct and an even greater degree of involvement are certain to arise, Respondent reiterates that a bright line is inappropriate.

(continued from previous page) ch. 38, § 9-1(c)(5); Ind. Code § 35-50-2-9(c)(4); Ky. Rev. Stat. §532.025(2)(b)(5); La. Code Crim. Pro. Ann. art. 905.5(g); Md. Crim. Law Code Ann. §413(g)(6); Mo. Rev. Stat. §565.012.3(4); Mont. Rev. Codes Ann. §46-18-304(6); Neb. Rev. Stat. §29-2523 (2)(e); Nev. Rev. Stat. §200.035(4); Or. Rev. Stat. §163.115(3); S.C. Code §16-3-20(C)(b)(4); Tenn. Code Ann. §39-2404(j)(5); Utah Code Ann. §76-3-207(1)(f); 1981 Wash. Laws Chap. 138, §7(4); Wyo. Stat. §6-4-102(j)(iv).

2. Deterrence

The next question which should be examined is whether the Florida Legislature could rationally conclude that a potential offender would be deterred from committing one of the enumerated underlying felonies if the possibility of capital punishment were real. When evaluating the propriety of Florida's legislative determination, the Court should note the presumption of validity accorded to various legislative determinations. Justice White, dissenting in the now famous abortion case, Roe v. Wade, 410 U.S. 113, 222 (1973), summarized the applicable standard of review:

> In a sensitive area such as this, involving as it does issues over which reasonable

men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part should be left with the people and to the political processes the people have devised to govern their affairs. (Emphasis added).

Petitioner has argued that because the death penalty has not been imposed often in a felony-murder context, a fact which is not supported by experience in Florida,[10] death cannot be a deterrent

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[10]Of the sixty-six inmates awaiting execution at Florida State Prison whose death sentences have been affirmed by the Florida Supreme Court, forty-five (68%) were involved in the commission of underlying felonies when homicides occurred. See Appendix.

to the commission of the underlying felony. To support this argument, Petitioner has relied upon three studies conducted in 1926, 1948, and 1975, and cited in a comment to the Model Penal Code. However, these studies were merely compilations of the number of crimes reported and the number of times deaths had resulted during the commission of those crimes. Respondent fails to comprehend how any conclusion can be drawn about deterrence when no one knows how many crimes were not committed because of fear of the punishment which could be imposed. Notwithstanding the inherent unreliability of such statistics, Petitioner's argument must fail because he has provided no statistics (nor could he) for crimes which were not committed because of fear

of capital retribution.

Rather than rely upon strained interpretations of confusing and conflicting statistics, Respondent urges that the Court continue to apply a policy of common sense. In that regard, consider the example of the smart or experienced criminal who, by exercising his dominion and influence over a less mentally gifted criminal is able to procure or persuade him to commit one of the underlying felonies and a death occurs.

Should the one who planned and instigated the felony, but who stayed away because he was shrewd enough to be aware that he would not be eligible for the ultimate penalty, be allowed to escape full culpability for homicides which would never have occurred but for

his setting the crime in motion? This is especially true when the actual perpetrator has received a death sentence. Obviously, the answer to this question should be a resounding NO! In fact, who is more deserving of severe punishment -- shouldn't it be the criminal who caused the crime to occur? Since an aider and abettor can be as culpable and can be punished as a principal is "beyond constitutional challenge," Lockett, supra, at 438 U.S. 602, no thinking person can deny that there is a strong public policy against immunizing such a defendant from equivalent culpability in sentencing!

Moreover, the same rationale would apply to an adult criminal who hires or

persuades a juvenile to commit a felony in which a death occurs. In jurisdictions in which certain juveniles are not treated as adult offenders, should the adult be insulated from full criminal responsibility simply because the principal who committed the murder cannot receive a death sentence? Again, the answer must no. Otherwise, experienced adult criminals would simply have juveniles do the dirty work for them -- common sense mandates that the state legislatures be permitted to enact laws which would prevent such ruthless situations from being able to occur and continue. Do not encourage the emergence of untold Fagins.

Another example, also contrary to prudent public policy, that would be certain to occur if Petitioner's argument is accepted by the Court, concerns what would happen at the trial of a defendant who actually pulled the trigger in a case like Petitioner's. Defense counsel would surely attempt to evoke the jury's sympathy by pointing out that the "person really responsible," i.e., the one who, like Petitioner, planned, initiated, and assisted in covering up the crime, could not receive the maximum sentence.

This watering-down effect on capital punishment during trials of killers should not be permitted. The time has come for this Court to allow society to implement those laws designed to stop those who senselessly and needlessly violate the laws which most of us

respect. Respondent urges that this Court not prohibit the States from enacting and enforcing laws which deter crime. After all, even Counsel for Petitioner would not seriously dispute that state governments have a duty to protect all citizens' constitutional rights to be safe and secure in their homes and communities and to enjoy "domestic tranquility." In other words, citizens have rights also and one is the right to enact laws designed to promote "domestic tranquility."

Finally, should Petitioner be successful in persuading the Court to create a rule that one who does not intend death cannot receive the death penalty, regardless of the foreseeability of the dangerousness of his crime, the next step would be an attack upon capital

punishment for those who planned death but did not actually commit the killing. Consider the example of one who initiates a contract killing. Although the planner and procurer has an intent to cause a victim's death, should he be allowed to escape full responsibility because he deliberately was not present and did not pull the trigger? Again the answer must be a resounding no. In Florida, as well as at least twenty-four (24) other states,[11] the state legislatures have

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[11]The following states either specifically make murder for hire a capital offense or allow a murder conviction to be aggravated for sentencing purposes if the defendant hired someone to commit murder: Ariz. Rev. Stat. Ann. §13-703(f)(4); Ark. Stat. Ann. §41-1501(1)(g); Colo. Rev. Stat. §16-11-103(6)(e); Conn. Gen. Stat. §53a-54b; Del. Code Ann. tit. 11, §4209(e)(h); Ga. Code §27-2534.1(6); Idaho Code §19-2515(f)(4); Ill. Rev. Stat. ch. 38, §9-1(b)(5); Ind. Code §35-50-2-9(b)(5); La. Code Crim. Pro. Ann. art. 905.4(e) (West); Md. Crim.

refused to allow such a bizzare and arbitrary distinction to erode the effectiveness of capital punishment. This type of law is a rational response by those responsible for the health, safety, and welfare of the people, and Petitioner has been unable to demonstrate how such a rational determination offends the Constitution.

3. Moral Outrage

In the 1976 death penalty cases which upheld capital punishment, the

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(continued from previous page) Law Code Ann. §413(d)(7); Miss. Code Ann. §97-3-19(2)(d); Mo. Rev. Stat. §565.012.2(6); Neb. Rev. Stat. §29-2523(1)(c); N.H. Rev. Stat. Ann. §630.01(I)(c); Ohio Rev. Code §2929.04(A)(2); Okla. Stat. Ann. tit. 21, §701.12.3; Or. Rev. Stat. §163.095(1)(b); S.C. Code §16-3-20(C)(a)(6); S.D. Compiled Laws Ann. §23A-27A-1(5); Tenn. Code Ann. §39-2404(i)(4); Tex. Penal Code Ann. tit. 5, §19.03(a)(3); Vt. Stat. Ann. tit. 13, §2301; 1981 Wash. Laws Chap. 138, §2(5).

Court also noted that retribution and incapacitation were viable theories to support capital punishment. Respondent would add that both incapacitation and retribution (moral outrage) are equally applicable in felony-murder situations. In response to Petitioner's argument that a death sentence would not deter a murderer, Respondent simply points out that the justification for such punishment in cases like Petitioner's is deterrence from commission of the underlying felony and as a result the forseeable, albeit unintended, homicide.

Also, the concept of moral outrage is even more appropriate in felony-murder cases than in cases involving premeditated murder, because most premeditated murders arise out of crimes of passion which are based upon motive -- crimes

where the death penalty is rarely imposed. An unintended murder is still murder even though it arises out of the commission of a felony such as rape or armed robbery. This type of crime can strike any citizen without rhyme or reason and therefore people have just cause to fear and despise it the most.

Finally, the propriety and rationality of Florida's legislative determination that the ultimate penalty is appropriate in a case like this becomes strikingly apparent when one considers that a criminal has nothing to lose if he or his accomplice murders his victim during or after completion of the underlying felony. If the victim is not murdered, he might return to assist in convicting the criminal of the underlying

felony. On the other hand, if the victim is murdered, there is absolutely no possibility of future identification by the victim, and the criminal might escape responsibility for his heinous crimes altogether.[12]

In other words, a felon has everything to gain and nothing to lose by murdering the victim of the underlying felony because he usually cannot receive a greater punishment than the life sentence he is probably already subject

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[12]In a very recent case, Vaught v. State, ___ So.2d ___, No. 52,835 (Fla., opinion filed Jan. 7, 1982), the Supreme Court of Florida recognized the value of such a sanction and upheld the death sentence of a defendant who was found to have murdered in order to prevent subsequent identification by the victim. See also: Hargrave v. State, 366 So.2d 1,5 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).

to for commission of one or more of the serious enumerated felonies. Judicial acceptance of such a result would be tantamount to the issuance of "death warrants" for innumerable convenience store clerks and service station operators who are the present-day targets of thugs who have little or no regard for the lives of others. Obviously, this is an anomalous situation which the Florida Legislature, or any other legislature responsible for the protection of its constituents, cannot allow to occur. Indeed, Respondent submits that it would be irresponsible for any legislative body to permit a situation which does not allow an added effective sanction to penalize a criminal for an additional, though not originally planned, heinous act -- in this case first degree murder.

More importantly and more relevant to a disposition of this case, no objective or rational person could seriously argue that a legislative body could not infer or conclude that capital punishment for the commisson of a serious felony which results in death of a human being would not deter others from engaging in such felonious conduct. Likewise, a legislative body could rationally conclude that if capital punishment were available, felons would avoid injury to their victims at all costs.[13] The fact that deaths

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[13]In a 1970-71 study conducted by the Los Angeles Police Department, it was found that 50.5% of a group of arrestees who either were unarmed or failed to use their weapons were deterred by fear of the death penalty. See Amicus Curiae brief of California, p. 38, filed in Gregg v. Georgia, supra.

occur in only a relatively small number of the hundreds of thousands of robberies committed each year demonstrates that the perpetrators well know the consequences that can result where a death is involved.

Petitioner has failed to demonstrate that a legislature could not so conclude, and the Gregg, Proffitt, and Jurek cases unequivocally require him to carry that heavy burden. The next question which must be resolved is whether the death sentence was appropriate in Petitioner's case.

ARGUMENT

II.

PETITIONER'S DEATH SENTENCE WAS APPROPRIATE BECAUSE OF HIS EXTENSIVE INVOLVEMENT IN THE CRIMINAL ACTIVITY, THE NATURE AND CIRCUMSTANCES OF THE CRIME, AND THE FACT THAT HE PRESENTED ABSOLUTELY NO EVIDENCE IN MITIGATION.

Petitioner has somehow concluded that both the trial court and the Supreme Court of Florida afforded inadequate consideration to his extent of participation in the murders and robbery. This conclusion is apparently based upon Petitioner's independent conclusion that § 921.141(6)(d), Fla. Stat., concerning the extent of an accomplice's participation, should have been found. Then, after manufacturing an inapplicable mitigating circumstance, Petitioner has asserted that his death sentence cannot

stand because the remaining aggravating circumstances, in his opinion, do not outweigh the mitigating. However, the Florida courts' findings of the inapplicability of any mitigating circumstances, either statutory or non-statutory, are supported by the record, and Petitioner's death sentences should not be disturbed.

Respondent recognizes that Lockett v. Ohio, supra, mandated that in a capital case the sentencing authority "not be precluded from considering as a mitigating factor, [emphasis in original] any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 438 U.S. 604. (Emphasis added). Ohio's statute failed to pass

constitutional muster because it prevented the sentencing authority from giving independent mitigating weight to aspects of the defendant's character and record and because it prevented consideration of the "circumstances of the offense proffered in mitigation" by the defendant. Id. at 438 U.S. 605 (Emphasis added). As has previously been noted, see n. 1 at p. 4, infra, Florida'a death penalty statute allows any evidence relevant to the nature of the crime and the character of the defendant to be admitted in mitigation. See §921.141 (1), Fla. Stat.; Lockett v. Ohio, supra; Proffitt v. Florida, supra, Shriner v. State, 386 So.2d 525, 533 (Fla. 1980), cert. denied, 101 S.Ct. 899 (1981).

It is extremely critical that the Court be aware that during the sentencing phase of the trial, not only did Petitioner fail to introduce or proffer any evidence concerning the extent of his involvement in the crimes, but also that he failed to present or proffer any evidence at all in mitigation. (R 1677). How then can Petitioner be heard to complain to this Court that the Florida courts failed or refused to consider relevant mitigating circumstances when he neither introduced nor proffered any evidence in his behalf? Surely, he cannot!

However, notwithstanding Petitioner's total failure to proffer or present any mitigating evidence, it is clear from the record that both the trial court and the Supreme Court of Florida

considered and rejected the applicability of the mitigating circumstance concerning Petitioner's degree of participation in the crimes. Thus, Petitioner's case is completely unlike Eddings v. Oklahoma, supra, in which the Oklahoma courts failed to consider certain evidence which had been introduced for purposes of mitigation. For example, the trial court in its written findings, which were reproduced in the Florida Supreme Court's opinion, (J.A. 53) stated:

> As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981). The Supreme Court of

Florida agreed with the trial court's conclusion that § 921.141(6)(d) was inapplicable. Id. Moreover, it is clear from the Florida Supreme Court's statement of facts that that Court was aware of Petitioner's extensive involvement in the crimes -- Enmund initiated the plan for the robbery (Id. at 1365, J.A. 38; R 997-1000), was seen near the scene of the crimes on the morning of the murders (Id. at 1364, J.A. 37; R 1300-1303), admitted that he had seen Mr. Kersey with the money when he was present on Kersey's property (R 1205, 1206), and caused disposal of the murder weapons (Id. at 1366, J.A. 41; R 1201). Just because evidence of a mitigating circumstance could have been introduced, it does not necessarily follow that such a mitigating fact had to be found to

exist. Eddings v. Oklahoma, supra; Hargrave v. State, supra. Petitioner's assertion that his involvement in the crimes was minor is simply wishful thinking -- as the record clearly shows, the crimes never would have occurred had it not been for Earl Enmund.

Finally, there are at least three reasons why this Court must reject Petitioner's assertion that he should be resentenced because the Supreme Court of Florida eliminated certain aggravating circumstances found by the trial court. First, contrary to Petitioner's wishful thinking, no mitigating circumstances were applicable and none were found. Second, two valid (and now unchallenged) aggravating circumstances were found -- under Florida law, death is presumed to be the appropriate sentence when there is

nothing in mitigation and at least one aggravating circumstance exists. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974). Third, under Florida law, when the reviewing court can determine from other validly found aggravating circumstances that "the weighing process has not been compromised," a death sentence will not be disturbed. Brown v. State, 381 So.2d 690, 696 (Fla. 1980), cert. denied, 101 S.Ct. 931 (1981); Hargrave v. State, supra. Petitioner was not denied due process during the sentencing proceedings in the Floirda courts, and his death sentences should not be disturbed.

CONCLUSION

The Constitution does not require a finding of intent before a defendant can be found criminally responsible for his

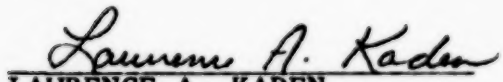
actions, and Petitioner has failed to offer a compelling reason why this Court should judicially create such a bright line rule. Rather, Florida's statute focuses on the facts and circumstances of the crime, as well as the character of the perpetrator, Eddings v. Oklahoma, supra, and culpability is rationally based upon concepts of forseeability.

During the sentencing phase of his trial, Petitioner neither introduced nor proffered any evidence in mitigation, and he should not be heard now to complain that the Florida courts "refused" to consider his degree of involvement in the murders. The facts and circumstances found to exist by the judge and jury are supported by the record and are sufficient to support the judgments and sentences of death. Therefore, the

decision of the Supreme Court of Florida upholding the judgments and sentences of death should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



LAWRENCE A. KADEN
Assistant Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Attorney of Record

RAYMOND L. MARKY
Assistant Attorney General

The Capitol Building
Tallahassee, Florida 32301